IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 245.

AH SIN,

Plaintiff in Error,

vs.

GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, State of California,

Defendant in Error.

In Error to the Superior Court, in and for the City and County of San Francisco, State of California.

Reply Brief of Plaintiff in Error.

I.

It is a matter entirely indefensible and inexcusable as well as censurable, for the counsel who represent the defendant in error, to assail the integrity of the record by their mere *ipsa dixit*, especially in view of the undisputed and unquestioned stipulation they have entered into (Record, p. 16) in the following terms, viz:

> "I hereby stipulate that the foregoing transcript of record is correct, and constitutes the record upon the writ of error herein.
>
> (Signed.) LEWIS F. BYINGTON,
> *District Attorney of the City and County of San Francisco, State of California, Attorney for Defendant in Error.*"

This stipulation not only conclusively refutes the contention that the allegations of the petition for *habeas corpus* were not admitted to be true, but it also fully answers the objection that the "return" to the writ has not been transmitted with the rest of the record. It seems that the attack now made upon the record is the invention of one I. Harris, who wrote the brief for defendant in error, and who is an assistant in the office of Byington, the district attorney. Mr. Harris was not present at the hearing of the *habeas corpus* case in the Superior Court and it is certainly very presumptuous in him to set up his contradiction of the record and expect, as he evidently does, that it be received in preference to the record itself.

In additional support of the record we have the judgment of the Superior Court, authenticated by the signature of the judge who presided at the hearing (Record, p. 14). "This matter," so states the record,

> "came on regularly for hearing this 28th day of March, A. D. 1904, the petitioner being represented by his counsel and the people being represented by the district attorney; whereupon it was stipulated and agreed in open court by counsel for the people and by counsel for the petitioner that the facts are, as set forth in the petition on file herein for the writ of *habeas corpus*. The cause was then argued by counsel on the points stated in the said petition and was thereupon submitted to the court for its decision and judgment; and the court being fully advised in the matter does now, upon the authority of the matter of *Ah Cheung*, 136 Cal., 678, dismiss the writ of *habaes corpus* heretofore issued herein and remand the petitioner to the custody of the chief of police of the City and County of San Francisco. Ordered accordingly. The petitioner reserved an exception to the judgment.

"Done in open court this 28th day of March, A. D. 1904.

(Signed) "WILLIAM P. LAWLOR,
Judge of said Superior Court."

In the very teeth of this judgment and of the stipulations set forth at page 16 of the printed record, and with a recklessness of assertion that defies responsibility, the counsel for the defendant in error now seek to impeach the verity of the record by falsely stating that it does not speak the truth; surely they must know that a judicial record cannot be impeached by contradiction *arguendo;* and if their conduct is attacked as being grossly improper and unprofessional, they cannot quarrel with the justice of the arraignment even though they may intensely feel the sting of its severity. We insist it is no trivial matter to charge falsity in a judicial record and suggest chicanary and fraud in its production; and when, as in this case, the charge is entirely groundless, the enormity of the offense committed against professional propriety is quite manifest. The case was presented to the Superior Court upon all the matters alleged in the petition for the writ of *habeas corpus* and the record so states (p. 14.) And when the district attorney cited the ruling in *Ah Cheung,* 136 Cal., 678, it was replied by us that the case was not authority on some of the questions we presented and that as to the points there actually decided, we assailed the decision as being in conflict with the Fourteenth Amendment. We did not at any time suggest that our only object was to test the soundness of the State Supreme Court decision. If such was our purpose, the petition for the writ of *habeas corpus* would not have specifically extended to other matters of federal cognizance, and also to matters exclusively of state cognizance, such as the proposition that the ordinance is void because it em-

braces more than one subject, and is therefore in violation of the municipal charter of San Francisco. There were no such questions raised or decided in the *Ah Cheung* case; we certainly did not at any time confine ourselves to the decision or to the record in that case; and we never stated to the Superior Court that we were merely seeking a review of the *Ah Cheung* decision. The record on this writ of error is conclusively to the contrary. So, too, the assertion of counsel for the defendant in error that none of the federal questions were "ever suggested to either the court or the district attorney until the filing of the brief by plaintiff in error herein, is palpably false. The petition for *habeas corpus* fully sets forth each and all of the federal questions, and the judgment of the Superior Court appearing at pages 13 and 14 of the printed record expressly states they were all of them presented; and they certainly were. The Superior Court seemed to think that the decision in the *Ah Cheung* case was authority not only on the points there presented and decided but also upon every point raised in our petition, and refused us relief.

As the questions presented in our petition for *habeas corpus* are, in the main, federal questions and as the record shows affirmatively, they were all raised in the lower court at the hearing of the case, the decision refusing relief to the plaintiff in error is a decision on these very questions, since if any one of these questions had been decided in *his* favor he would have been entitled to and would have obtained his discharge on the writ of *habeas corpus* that had been issued in the case. And turning to the writ of error as allowed by the trial judge and the presiding judge of the Superior Court (Record, p. 1), it expressly states that the federal questions were both raised and decided. An examination of the record will

clearly make manifest the fact that no decision was possible without necessarily passing upon each and all of the federal questions raised by the plaintiff in error. The exceedingly improper attack made by counsel for the defendant in error upon the verity of the record is the more extraordinary because they must have known that the record cannot be thus impeached.

"The record imports absolute verity."

Evans v. *Stettnisch*, 149 U. S., 605, 607.

"No evidence *dehors* the record, as certified and returned by the clerk of the Circuit Court, can be received here to impeach its verity, or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court."

Hudgins v. *Kemp*, 18 How., 534.

"The record as embodied in a properly prepared and duly authenticated transcript imports absolute verity and cannot be aided, varied or contradicted by extrinsic evidence. The record cannot be contradicted by a plea in the appellate tribunal."

Elliott's Appellate Proc., Sec. 186.

Middlebrooks v. *Middlebrooks*, 57 Ga., 193.

Bartoli v. *Hugneward*, 39 La. Ann., 411.

Boston v. *Haynes*, 31 Cal., 107.

Ashley v. *Howard*, 90 Ga., 132.

Nixon v. *Barber*, 27 Vt., 783.

Wilmot v. *Smith*, 86 Wis., 299.

Wilson v. *Taylor*, 119 Mo., 626.

Blanchard v. *Devoe*, 80 Ia., 521.

Succession of Edwards, 34 La. Ann., 211.

Baird v. *Woodard*, 43 Neb., 310.

These cases are cited in the Century Digest in support of the point we are urging.

We insist there is no possible excuse for the attack made upon the record, not only because it is made in a manner unauthorized by law, but for the further reason that by both the judgment of the Superior Court and the stipulation of the counsel for the defendant in error, appearing at page 16 of the printed record, the attempted impeachment of the record is founded upon assertions absolutely false and untrue.

If for any reason a record does not speak the truth, the remedy must be sought in the court whose record it is. It is not within the province of an appellate tribunal to entertain or act upon a suggestion that the record does not express the truth. If the transcript of the record is defective or incorrect or incomplete, in that event only can the Appellate Court grant relief; this is done by means of a *certiorari* or mandamus.

Nashua & L. R. R. v. *Boston & L. R. R.*, 21 U. S. App., 50, 60, 63.

II.

The objection that the return to the writ of *habeas corpus* has been omitted from the transcript of the record, is clearly without merit. No paper or document is properly made a part of the transcript of the record unless it is pertinent to the questions raised. The practice of bringing up unnecessary papers has been repeatedly condemned.

Nashua & L. R. R. v. *Boston & L. R. R.*, 21 U. S. App., 60, citing:

Railway Co. v. *Stewart*, 95 U. S., 279, 284.

Craig v. *Smith*, 100 U. S., 226, 230.

The Adriatic, 103 U. S., 730.

Ball & S. Co. v. *Kraetzer*, 150 U. S., 111, 118.

> "Where the transcript or return contains all that is necessary to the decision of the matters assigned as error, a motion to dismiss or affirm on the ground of defects or omissions therein of an immaterial character will not be sustained."
>
> 3 Cyc., 139.

Besides, it is expressly stipulated by the counsel for the defendant in error (p. 16) that the transcript of the record "is correct and constitutes the record upon the writ of error herein." Why the counsel should seek to impugn his own stipulation is certainly beyond our comprehension. Manifestly the return to the writ of *habeas corpus* is entirely irrelevant to the questions raised. The petition for the writ sets forth all the essential facts and its allegations are admitted to be true and so stated in the judgment of the Superior Court (pp. 13, 14). Even if no such stipulation had been made, the result would be the same, as the return does not controvert the averments of the petition. Say the Supreme Court of California, speaking of the petition and return on *habeas corpus*:

> "Under our practice, upon the filing of the return, the petition is treated as a traverse to it. Then if any of the matters in the petition so treated as a traverse to the return are denied, it is incumbent upon the person to whom the writ is addressed to join issue upon them. In the absence of such issue joined, the facts set forth in the petition will be taken as true. So in this case the facts averred will be considered as admitted."
>
> *In Re Smith*, 143 Cal., 370.

This case was quite recently cited by the Supreme Court of the United States in support of the point we are now making, in a *habeas corpus* proceeding that went up on writ of error to the Supreme Court of California. We have been unable to obtain a reference to the report

of the case but we know it involved some corporation or company in Los Angeles.

In our opening brief we have cited decisions of the Supreme Court of the United States fully sustaining the proposition that the averments of the petition for *habeas corpus* must be taken as true if not controverted by the return or by an answer in aid of the return. There was no issue joined or tendered on the petition for *habeas corpus* and therefore its averments must be taken as stating the truth even though no stipulation had been made to the effect that the matters stated in the petition are the facts of the case.

III.

Nor is there any merit in the contention of counsel for the defendant in error to the effect that the Supreme Court had no jurisdiction in the *habeas corpus* proceedings because it admitted the prisoner to bail pending the hearing upon the writ. In the first place the point itself cannot be considered upon the writ of error, as the decision of the Superior Court is based exclusively upon the federal questions involved and not at all upon the point now for the first time suggested by counsel for the defendant in error. In the next place it is well settled that a court having power to issue the writ of *habeas corpus* may admit the prisoner to bail pending the determination of the case.

Barth v. *Clise*, 12 Wall., 401, 402.
In Re Kaine, 14 How., 133.
King v. *Bethel*, 5 Mod., 22.

It has always been the practice in California to admit to bail pending the decision upon the writ of *habeas cor-*

pus and counsel for defendant in error made no attempt to question the practice when the case was before the Superior Court. No one disputes the proposition that the person in whose interest the writ is issued must be in actual custody when the petition is filed and the writ served. The petition in this case expressly avers that Ah Sin is in custody; the pleading is verified and in addition, the record contains the admission that the petition states the truth. The Superior Court ordered the prisoner admitted to bail pending the hearing and determination of the writ (p. 12) and the writ of *habeas corpus* so states (p. 13). On this writ of error, by the provisions of the rule of the Supreme Court of the United States, the plaintiff in error is entitled to bail.

But the point attempted to be raised by the defendant in error cannot be considered. In the first place the record does not show that the plaintiff in error was not in custody when the writ of *habeas corpus* was served, and

> *"De non apparentibus et de non existentibus eadem est ratio,* is an old and well established maxim in legal proceedings and is founded on principles of justice as well as of law."
>
> *United States* v. *Wilkinson,* 12 How., 253, per TANEY, C. J.

In the next place no such point was raised or determined in the Superior Court; and the judgment of the Superior Court excluded the point entirely by placing the decision upon the merits of the case as presented in the petition for the writ of *habeas corpus* where it is expressly alleged that Ah Sin is in the custody of the chief of police, who is the defendant in error. The fact that Ah Sin has been released on bail pending the proceedings in error does not impair or supersede or destroy the jurisdiction of the Superior Court, nor the jurisdiction of the

Supreme Court of the United States. Nor can the latter court do otherwise than take the record as being conclusive of the facts and of the grounds upon which the Superior Court rendered its decision.

IV.

In construing and interpreting the ordinance in question, the Supreme Court of the United States will be guided by its own view of the ordinance and will determine its meaning accordingly and will not receive as authoritative the construction given by the state court. This was so held in *Yick Wo* v. *Hopkins,* 118 U. S., cited in our opening brief. Therefore it is of no importance to know what construction the state court has placed upon the ordinance by way of judicial legislation in order to sustain it. The record shows the interpretation placed on the ordinance by the police court, the court of original jurisdiction, and affirmed by the Superior Court and shows that the effect of the ordinance is to make guilty of crime a person entirely innocent. An ordinance having such an effect is clearly unconstitutional and void for that reason alone. As to the other points presented in the petition for *habeas corpus,* they were all of them raised, argued and decided in the Superior Court, as the record affirmatively shows, and nothing in the naked and entirely unsupported statement of the counsel for defendant in error can impeach the verity of the record. It does not require our counter-assertion to sustain the record; but the fact is the petition for the writ of *habeas corpus* was before the Superior Court and read to the court on the hearing and each and every point there averred was presented and argued as is stated in the

judgment appearing at pages 13 and 14 of the printed record. The terms of that judgment are a complete and conclusive refutation of the position taken by the counsel for defendant in error. Our opening brief fully presents the points and authorities upon which we confidently rely for a reversal of the judgment of the Superior Court; we have in addition covered in this reply brief, every proposition urged by the defendant in error, and we respectfully submit that upon the points and authorities presented in our opening brief, the judgment of the Superior Court should of right and according to the law of the land, be *reversed*.

GEORGE D. COLLINS,
Attorney for Plaintiff in Error.